BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RALPH STUBBS Claimant VS. **UNITED PARCEL SERVICE** Respondent AND **LIBERTY MUTUAL INSURANCE COMPANY** Insurance Carrier	)	Docket No. 192,450

ORDER

Claimant appeals from a November 3, 1994, Preliminary Hearing Order entered by Administrative Law Judge Alvin E. Witwer, denying claimant's request for benefits.

ISSUES

In his Application for Review, claimant raises two issues:

(1) Whether claimant's injuries arose out of and in the course of his employment with the respondent;

(2) Whether claimant gave respondent timely notice of his on-the-job accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

K.S.A. 44-534a confers upon the Appeals Board the authority to review preliminary findings which address the above enumerated issues. Based upon the evidence presented and for purposes of preliminary hearing, the Appeals Board finds as follows:

(1) Claimant has not established by a preponderance of the evidence that he suffered personal injury by accident on the dates alleged.

Claimant was employed by respondent as a truck driver in the feeder department. His job duties primarily involved driving a tractor trailer. In early May of 1994 he experienced the onset of a dull pain in his lower back. The pain varied, sometimes lasting two or three days. Usually Advil or aspirin took care of the pain. He does not recall any specific event that caused these back problems, but he noticed symptoms more when driving. He did not seek medical treatment for the backaches at that time.

Claimant took a vacation from May 15 to May 22, 1994, to do planting on his farm. He did some disking and drilled beans. This required him to carry fifty (50) pound sacks of bean seed from his pickup to the drill. He estimates he spent between twenty-five to thirty (25-30) hours in his tractor. About midweek his low back started bothering him. It was the same type of dull backache that he had experienced previously. He took Advil and aspirin, but the pain lingered on beyond the usual two or three days, so he decided to see a doctor.

Claimant states that he was not involved in any accidents or injuries and denies any sudden increase or onset of pain. He decided to see a doctor because the pain lasted longer than it normally did and because he was on vacation and would not miss work. Claimant saw his personal physician, Dr. Kanne, on May 22, 1994. Claimant insists that he described his earlier back problems to Dr. Kanne, but the doctor's records reflect a patient history of severe muscle spasm and tenderness in the right lower lumbar area the last three to four days. The office notes reflect that claimant had been driving a tractor all week plus lifting sacks of soybean seeds.

Dr. Kanne took claimant off work for a week, during which time claimant used personal leave time for his absence. Dr. Kanne's bills were submitted to claimant's personal health insurance carrier and not to respondent's workers compensation insurance carrier. Claimant returned to work without restrictions on May 31, 1994. He stated that he was not one-hundred percent (100%) better, but the pain was not as bad as it had been before. Claimant's first trip was to Omaha, Nebraska. He describes an incident that occurred while unhooking trailers where he felt a real severe pain in his back and for the first time had leg pain that was very intense. Thereafter, he had difficulty getting hooked up and driving and so was late getting back to Kansas City. According to claimant, when he arrived at the gate in Kansas City he got on the phone and described having a problem in Omaha. He does not recall who it was he talked to on the phone. He subsequently made another trip to Omaha and a trip to Columbia, Missouri.

Claimant alleges accidental injury occurring May 2, 1994, and each and every day worked thereafter, with a specific incident occurring on June 1, 1994 in Omaha, Nebraska. He returned to Dr. Kanne June 7. He was subsequently referred to Dr. Gregory Walker and Dr. Hornig. He admits he did not tell either of these doctors about the injury in Omaha during his initial office visits.

Claimant bears the burden of proof to establish his claim. "Burden of proof" is defined in K.S.A. 44-508(g) as ". . . the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." The burden of proof is:

> ". . . on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's

> right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record." K.S.A. 44-501(a).

Following the Preliminary Hearing, Administrative Law Judge Alvin E. Witwer found "That the claimant has not proved by a preponderance of credible evidence that he sustained personal injury or injuries by accident or accidents arising out of and in the course of his employment with the respondent during the period May 2, 1994 through June 1, 1994." We agree.

In order to recover, the claimant must establish he has sustained a personal injury by accident arising out of and in the course of his employment. K.S.A. 44-501(a). "Personal injury" is defined in K.S.A. 44-508(e) as:

> ". . . any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living."

The terms "injury" and "accident" are not synonymous. Each must be established by the claimant. An "accident" is ". . . an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force." K.S.A. 44-508(d). An accident is an event which causes an injury. The injury is a change in the physical structure of the body which occurs as a result of the accident. Barke v. Archer Daniels Midland Co., 223 Kan. 313, 317, 573 P.2d 1025 (1978).

Further, the claimant must establish that he has sustained an accident and injury arising out of the employment and in the course of the employment. These are separate elements which must be proven in order for the claim to be compensable. Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973). In order to establish that the incident "arose out of the employment", the claimant must show that there is some causal connection between the accident, injury and the employment. To do this, it must be shown that the injury arose out of the nature, conditions, obligations and incidents of the employment. Only risks associated with the work place are compensable. "In the course of the employment", relates to the time, place and circumstances under which the accident occurred, and that the injury happened while the employee was at work at his or her employer's service. Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 197, 689 P.2d 837 (1984).

The Kansas Supreme Court has ruled that it is not necessary for the injury to be caused by trauma or some form of physical force to be compensable. Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 379, 573 P.2d 1036 (1978). Personal injury or injury results from an accident which can occur in a single event or from a series of events which occur over time. The event or events do not have to be traumatic or manifested by force. Rather, an accident can occur when, as a result of performing his or her usual tasks in their usual manner, the employee suffers an injury. Downes v. IBP, Inc., 10 Kan. App. 2d 39, 41, 691 P.2d 42 (1984), rev. denied 236 Kan. 875 (1985). Also, it is well settled in this State that an accidental injury is compensable where the accident only serves to

aggravate or accelerate an existing disease or intensifies the affliction. Harris v. Cessna Aircraft Co., 9 Kan. App. 2d 334, 678 P.2d 178 (1984). Demars v. Rickel Manufacturing Corporation, *supra*; Chinn v. Gay & Taylor, Inc, 219 Kan. 196, 547 P.2d 751 (1976).

The evidence in this case does not support a finding of personal injury by accident on the dates alleged arising out of and in the course of the employment.

(2) Claimant did not give respondent timely notice of his on-the-job accident as is required by K.S.A. 44-520.

Claimant describes having several conversations with his dispatcher, Mr. Jim Yankovich, concerning his back problems both before and after his alleged June 1 injury in Omaha. Mr. Yankovich testified that he was aware of claimant having back complaints but specifically denied claimant ever having related those complaints to his work or an on-the-job injury. Claimant did not file an accident report with his employer until July 14, 1994. That accident report described a dull backache during May 2 through May 13, 1994 but makes no mention of any subsequent injury and is silent as to any injury occurring June 1, 1994 in Omaha.

Judge Witwer found ". . . the evidence does not reflect that the claimant advised appropriate personnel of the respondent that he had sustained a personal injury by accident at Omaha, Nebraska." Again, we agree that the weight of the credible evidence supports the finding of the Administrative Law Judge.

Claimant testified to having several conversations with individuals at UPS concerning his accident in Omaha but could not recall all their names. He mentioned Bill Stewart, the Center Manager and Rod Dutt, a dispatcher. Both Mr. Dutt and Mr. Stewart testified and denied any notice of a work-related accident from claimant prior to the July 14, 1994, employee injury report. Both testified that UPS procedure required employees to report any injury. Mr. Yankovich acknowledged that claimant had called him from Omaha and mentioned that he was hurting but was adamant that claimant did not say anything about an on-the-job accident or having hurt himself in Omaha. Mr. Yankovich was aware of claimant's prior back problems and specifically his having been off work due to a back injury occurring while claimant was on vacation. Mr. Yankovich testified that he definitely would have filled out an accident report if claimant had told him he had injured himself while working. Likewise, when claimant returned from his trip to Columbia on June 3, 1994, claimant said his back was still hurting and that he would probably take the next night off, but he again he did not say anything about having hurt his back while working. The first mention of a work-related injury was when claimant came in to fill out an injury report on July 14, 1994 because his insurance was not paying his medical bills.

Claimant admitted that he had previously received medical treatment and temporary total disability compensation through Workers Compensation for an on-the-job accident at UPS involving an injury to his shoulder. He was aware of the requirement to report on-the-job accidents. Nevertheless, he submitted his medical bills for his back treatment to his health insurance carrier. They disallowed the claim on the basis that the injury was work related.

K.S.A. 44-520 provides that a claimant must notify the respondent of an accident within ten (10) days of its occurrence, unless respondent possessed actual knowledge of the accident or failure to so notify within ten (10) days was due to just cause. Based upon

the evidentiary record presented and for purposes of preliminary hearing, the Appeals Board does not find that claimant has carried his burden of proving he gave respondent notice of accident within ten (10) days nor that there was just cause for his failure to give such notice.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Order of Administrative Law Judge Alvin E. Witwer, dated November 3, 1994, is affirmed.

IT IS SO ORDERED.

Dated this ____ day of February, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Keith L. Mark, Mission, KS
Frederick J. Greenbaum, Kansas City, KS
Alvin E. Witwer, Administrative Law Judge
George Gomez, Director